RECENT DECISIONS.

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AUCTIONS—RESERVATION OF THE RIGHT TO REJECT BIDS.—The dock commissioner of New York advertised certain privileges for sale at auction at a time specified, and recited that he reserved the right to reject any or all bids. The defendant became highest bidder at the sale, and the privileges were knocked down to it. The city brought suit to recover for rent of dock space on the theory that the bid had been rejected and consequently, that the defendant was liable as a hold-over under the terms of a former lease. *Held,* the city could not recover, since the rejection to be effective must be made before the bringing down of the auctioneer's hammer. *City of New York* v. *The Union News Co.* (App. Div., 1st Dept. 1915) 154 N. Y. Supp. 638. See Notes, p. 695.

CONSTITUTIONAL LAW—DUE PROCESS—WORKMEN'S COMPENSATION ACT—ABSOLUTE LIABILITY FOR INJURY TO EMPLOYEE.—The California Workmen's Compensation Act, 1913 Stat. Cal., Ch. 176, as amended by Chaps. 541, 607, 662 of the Laws of 1915, 1915 Stat. Cal. 913, 1079, 1302, provided that employers hiring any employee except those engaged in farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising, or in household domestic service, should be liable, without regard to negligence, to an employee for personal injuries incurred as a result of accidents arising out of, and in the course of employment. *Held,* Henshaw J. dissenting, the statute was constitutional. *Western Indemnity Co.* v. *Pillsbury* (Cal. 1915) 151 Pac. 398.

A discussion of the principles applicable to this case will be found in 10 Columbia Law Rev., 751, supporting the constitutionality of the similar statute applied in the Ives case; and in 11 Columbia Law Rev., 475 there is a comment on the adverse decision of that case by the New York Court of Appeals. The same court, however, with the aid of a constitutional amendment, has recently held an analogous statute valid. *Matter of Jensen* v. *Southern Pac. Co.* (1915) 215 N. Y. 514. The California court also was aided by a provision in the State Constitution, Cal. Const. Art. 20, § 21, permitting such legislation. The only other statute of a like character called into question since the Ives case, received the stamp of judicial approval in *State* v. *Clausen* (1911) 65 Wash. 156. Although the California statute is broader than any of the others thus far construed, in that its provisions are not limited to those engaged in extra hazardous occupations, the decision shows forcibly the trend of judicial opinion toward the position that was taken in 10 Columbia Law Rev., 751.

CONSTITUTIONAL LAW—RELIGIOUS LIBERTY—COMPULSORY READING OF BIBLE IN PUBLIC SCHOOL.—A parish board of school directors adopted a resolution requiring the reading of the Bible in the public schools. *Held,* this is a violation of the guaranty of religious liberty contained in the Louisiana Constitution. *Herold* v. *Parish Board of School Directors* (La. 1915) 68 So. 116. See Notes, p. 704.

CONTRACTS—FORMAL DOCUMENT—FAILURE TO EXECUTE.—The defendant, by a letter, sent in its bid on government construction work to

the plaintiff in response to an advertisement. The plaintiff, by a letter, told the defendant that his bid had been accepted. Before execution of the formal document the defendant refused to perform. *Held,* the parties merely intended that the formal document be evidence of an already existing agreement contained in the correspondence, and the defendant is bound. *United States* v. *P. J. Carlin Constr. Co.* (C. C. A., 2nd Cir. 1915) 224 Fed. 859. See Notes, p. 700.

CORPORATIONS—NOTICE TO AGENT—WHEN IMPUTED TO CORPORATION.—In an action by the corporation against the defendant and its president to recover damages for fraud, *semble,* a corporation is charged with knowledge of one of its officers, who, though acting for himself, was at the same time the sole representative of the corporation. *Saratoga Inv. Co.* v. *Kern* (Ore. 1915) 148 Pac. 1125.

Whether the doctrine of imputed notice is based on reasons of expediency and public policy, Pomeroy, Equity Jurisprudence, § 676, or upon the theory of the legal identity of agent and principal, 2 Mechem, Agency (2nd ed.) § 1805, or upon the duty of the agent to report to his principal, *Knobelock* v. *Bank* (1897) 50 S. C. 259, 289; *Krenkel* v. *Hudson* (1886) 82 Ala. 158; 2 Mechem, Agency (2nd ed.) § 1806, the broad rule is that a corporation is charged with knowledge acquired by its agent when acting in his official capacity and within the scope of his authority. Huffcut, Agency (2nd ed.) § 146; see *Oliver* v. *Grande Ronde Grain Co.* (1914) 72 Ore. 46. There is, however, an exception recognized when the agent acts for his own interests or for a third party, and adversely to the corporation; under these circumstances notice will not be imputed to the corporation. Clark, Corporations (2nd ed.) § 198; *Seaverns* v. *Presbyterian Hospital* (1898) 173 Ill. 414, 419; *Wickersham* v. *Chicago Zinc Co.* (1877) 18 Kan. 481; see *Innerarity* v. *Bank* (1885) 139 Mass. 332. But, as in the principal case, the majority of courts will not apply this exception when the agent acts as the sole representative of the corporation; the corporation is then charged with the agent's notice. *Mutual Inv. Co.* v. *Wildman* (1913) 183 Ill. App. 137; *Cook* v. *American Tubing & W. Co.* (1908) 28 R. I. 41, 73; see *Morris* v. *Georgia Loan Co.* (1899) 109 Ga. 12. This last rule seems to be based on the theory that, in acknowledging the act of its sole agent, the corporation ratifies the transaction and is therefore chargeable with his knowledge. 2 Mechem, Agency (2nd ed.) § 1825.

CORPORATIONS—VALIDITY OF INCORPORATION—INQUIRY BY JUDGE OF HIS OWN MOTION.—In a suit to enjoin the infringement of a patent, the validity of the plaintiff's incorporation was not raised by the pleadings. *Held,* the judge of his own motion could dismiss the suit on account of the plaintiff's lack of corporate capacity. *American Ball Bearing Co.* v. *Adams* (D. C., N. D., Ohio, 1915) 222 Fed. 967. See Notes, p. 706.

COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.—In an action in which the demand was for $2000 with interest, *held,* the County Court, whose jurisdiction is limited to actions wherein demand is made for judgment not exceeding $2000, is without jurisdiction. *Halpern* v. *Langrock Bros. Co.* (N. Y. App. Div., 2nd Dept., 1915) 155 N. Y. Supp. 167.

It is well settled that judicial costs, being merely incident to recovery, are not to be considered in determining the amount in controversy for purposes of jurisdiction. *Hamburger* v. *Hellman* (N. Y. 1905) 103 App. Div. 263; *Louisville & N. R. R.* v. *Sutton* (1907) 54 Fla. 247; see *Payne* v. *Davis* (1876) 2 Mont. 381. Attorneys' fees, however, where there is no statute taxing them as costs, *Eagle G. M. Co.* v. *Bryarley* (1901) 28 Colo. 262, are a part of the amount involved. *Clark* v. *Ford* (1897) 7 Kan. App. 332; *Blankenship* v. *Wartelsky* (Tex. Civ. App. 1887) 6 S. W. 140. Similarly, the courts consider as a part of the jurisdictional amount the interest which the defendant has agreed to pay, *Wilson* v. *Sparkman* (1880) 17 Fla. 871; *Baxley Bkg. Co.* v. *Carter* (1900) 112 Ga. 529, or the interest which is allowed to the plaintiff by law. *Hogan* v. *Odam* (Ala. 1830) 3 Stew. 58; *Blin* v. *Pierce* (1874) 20 Vt. 25; *Stone* v. *Hawkins* (1887) 56 Conn. 111; *Crawford* v. *Hurd Ref'g. Co.* (1894) 87 Minn. 187. But where the statute specifies that the jurisdiction shall be determined by the sum demanded "exclusive of interest", the amount in controversy is the principal alone, *Arnold* v. *Van Brunt* (1854) 4 Cal. *89, except where the law permits the recovery of interest as damages, *Schulz* v. *Tessman* (1899) 92 Tex. 488; see *Hamburger* v. *Hellman, supra*; or where the defendant has agreed to pay a certain amount made up of principal and accrued interest. *Bloom* v. *Kern* (1878) 30 La. Ann. 1263. Where defendant sets up a counterclaim, it is not to be added to plaintiff's claim to determine the amount in controversy. *Morrow* v. *Bell* (Iowa 1915) 151 N. W. 1084; see *Duresen* v. *Blackmar* (1912) 117 Minn. 206. Nor has a court jurisdiction of a counterclaim demanding a sum above or below the jurisdictional limit, notwithstanding that the plaintiff's claim is sufficient to permit his suit. *Griswold* v. *Pieratt* (1895) 110 Cal. 259; *Kienzle* v. *Gardner* (1903) 73 N. J. L. 258; *Dixon* v. *Watson* (1908) 52 Tex. Civ. App. 412; but see *Howard Iron Wks.* v. *Buffalo* (1903) 176 N. Y. 1; *cf. Lynch* v. *Free* (1896) 64 Minn. 277.

CRIMINAL LAW—VOID SENTENCE—DISCHARGE ON HABEAS CORPUS—MANDAMUS TO RESENTENCE.—Two men duly convicted of gaming had been sentenced to the penitentiary when the statute authorized only a sentence to hard labor for the county. They were released on habeas corpus, but the trial judge refused to resentence them. A mandamus was awarded commanding him to resentence. Upon a writ of certiorari obtained by the judge, *held*, the sentence to the penitentiary was void, but the discharge on habeas corpus was from custody only, and the mandamus was correctly awarded. *Ex parte Gunter* (Ala. 1915) 69 So. 442.

The authorities are in conflict as to whether an excessive sentence or a sentence to a wrong place is void, *Ex parte Cox* (1893) 3 Idaho 530; *Ex parte Moon Fook* (1887) 72 Cal. 10, or merely voidable. *Ex parte Mack Bowen* (1889) 25 Fla. 214; *Sennott's Case* (1888) 146 Mass. 489; *Ex parte Tani* (1907) 29 Nev. 385. Where the sentence is held to be void the prisoner will be discharged upon a writ of habeas corpus. 14 Columbia Law Rev., 86; Church, Habeas Corpus (2nd ed.) § 370; *cf. People ex. rel. Sheldon* v. *Curtin* (N. Y. 1912) 152 App. Div. 364, 369. Although it has been held that a discharge on habeas corpus under these circumstances is complete and conclusive, *State* v. *Gray* (1875) 37 N. J. L. 368; *Ex parte Cox, supra;* Church, Habeas Corpus (2nd ed.) § 386a, the weight of authority holds, as in

the principal case, that such discharge is not a release from the legal penalty but merely from custody, *In re Bonner* (1894) 151 U. S. 242; *State ex rel. Meisen* (1906) 98 Minn. 19; *State ex rel. Works* v. *Langum* (1914) 125 Minn. 304; *cf. Michaelson* v. *Beemer* (1904) 72 Neb. 761; *Barbee* v. *Weatherspoon* (1883) 88 N. C. 19, and that it is not a bar to further proceedings, because punishment inflicted without authority is not a satisfaction in the eyes of the law.

DAMAGES — PERSONAL INJURIES — FUTURE SUFFERING — PROOF. — The plaintiff was injured through the negligence of the defendant. *Held,* as the plaintiff's injury was subjective and such that laymen could not, with reasonable certainty, know that there would be future pain and suffering, she cannot recover for such suffering unless she introduces expert testimony to the effect that it will ensue. *Shawnee-Tecumseh Traction Co.* v. *Griggs* (Okla. 1915) 151 Pac. 230.

The general rule is that damages may be awarded for future pain and suffering which is reasonably certain to result from the injury. *Chicago & N. W. Ry.* v. *DeClow* (C. C. A. 1903) 124 Fed. 142; *Chicago, M. & St. P. Ry.* v. *Lindeman* (C. C. A. 1906) 143 Fed. 946; *Wilmerding* v. *City of Dubuque* (1900) 111 Iowa 484. But consequences which are contingent, speculative, or merely possible, are not to be considered in estimating the damages, and cannot be proved. *Phillips* v. *Hamilton Brown Shoe Co.* (1914) 178 Mo. App. 196; *Carlile* v. *Bentley* (1908) 81 Neb. 715; *cf. Strohm* v. *N. Y. etc. Ry.* (1884) 96 N. Y. 305; *Cross* v. *City of Syracuse* (1911) 200 N. Y. 393. Accordingly, an instruction that a jury had a right to consider testimony as to pain and suffering which plaintiff "may" endure in the future as a result of the injuries has been held error, as allowing the jury to go into the prohibited field of speculation. *Nixon* v. *Omaha etc. Street Ry.* (1907) 79 Neb. 550; *Ballard* v. *Kansas City* (1905) 110 Mo. App. 391; *contra, St. Louis etc. Ry.* v. *Grimsley* (1909) 90 Ark. 64; *Midland Valley Ry.* v. *Hilliard* (Okla. 1915) 148 Pac. 1001; *Reynolds* v. *St. Louis Transit Co.* (1905) 189 Mo. 408. While future pain and suffering may be proved by the opinion of experts, *Filer* v. *N. Y. C. Ry.* (1872) 49 N. Y. 42; *Cotant* v. *Boone Suburban Ry.* (1904) 125 Iowa 46; *Ayres* v. *Delaware L. & W. Ry.* (1899) 158 N. Y. 254, this is not necessary in all cases; and where an injury is such that a layman can tell with reasonable certainty that future pain will result, the jury may so find from facts established by non-experts. *Southern Ry.* v. *Clariday* (1906) 124 Ga. 958; *Ayres* v. *Delaware L. & W. Ry., supra; Lake Shore etc. Ry.* v. *Johnson* (1891) 135 Ill. 641.

DAMAGES—PROPERTY WITHOUT MARKET VALUE—MEASURE OF DAMAGES. —Through the defendant's negligence, the plaintiff's furniture, scrapbooks and data used by him as a writer, and a rare book written by one of his ancestors, were destroyed. *Held,* the measure of damages is the value to the plaintiff of the property destroyed. *Willard* v. *Valley Gas & Fuel Co.* (Cal. 1915) 151 Pac. 286.

Where the property injured or destroyed by the defendant has a market value, ordinarily such market value is the measure by which the damages are fixed. 1 Sedgwick, Damages (9th ed.) § 242; *Wade* v. *Herndl* (1906) 127 Wis. 544; *Marcus* v. *Stein* (1903) 84 N. Y. Supp. 970. But if the property consists of articles whose market value in no fair sense indicates the loss to the owner, such as furniture or clothing, damages are not restricted to the actual price the goods

would bring in the market, but a reasonable and fair value to the owner may be recovered. *Barker* v. *Lewis etc. Co.* (1905) 78 Conn. 198; *Fairfax* v. *New York Central etc. R. R.* (1878) 73 N. Y. 167; *Lovel* v. *Shea* (1892) 18 N. Y. Supp. 193. And, if the property has no market value at all, the real value is to be ascertained from such elements of value as are attainable. The cost to the plaintiff of producing, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner are proper elements to be considered. Hale, Damages (2nd ed.) 273; 1 Sedgwick, Damages (9th ed.) § 251a; *Southern Express Co.* v. *Owens* (1906) 146 Ala. 412; *Louisville & Nashville R. R.* v. *Stewart* (1900) 78 Miss. 600. Some courts hold, however, that the peculiar value to the owner by reason of his association with the property is not a subject of compensation; *St. Louis etc. R. R.* v. *Green* (1906) 44 Tex. Civ. App. 13; *Klein* v. *St. Louis Transit Co.* (1906) 117 Mo. App. 691; 1 Sedgwick, Damages § 251a; but the better view and the weight of authority permits the jury to assess damages with reasonable consideration of the owner's association with the articles in question. Hale, Damages, (2nd ed.) 280; 4 Sutherland, Damages, (3rd ed.) § 1099; *Green* v. *Boston etc. R. R.* (1880) 128 Mass. 221; *Bateman* v. *Ryder* (1901) 106 Tenn. 712; see *Suydam* v. *Jenkins* (1850) 3 Sandf. 614.

DIVORCE—JURISDICTION—RESIDENCE OF PLAINTIFF.—The plaintiff came to Nevada for the sole purpose of obtaining a divorce, intending to leave the State upon the granting of the decree. *Held,* as she had no intent to remain permanently she was not a resident of Nevada, and the court therefore had no jurisdiction. *Presson* v. *Presson* (Nev. 1915) 147 Pac. 1081. See Notes, p. 697.

DIVORCE—RECRIMINATORY DEFENCE—DENIAL OF RELIEF.—In an action for divorce on the ground of cruelty, it appeared that the petitioner's conduct was such as to entitle the defendant to a divorce. *Held,* a divorce will not be granted to either. *Peyton* v. *Peyton* (Neb. 1915) 151 N. W. 150.

In general, the American doctrine of recrimination in a suit for divorce admits of any offense that is a statutory cause for divorce as a bar to a divorce for any other. 1 Nelson, Divorce & Separation § 431; *Wilson* v. *Wilson* (1911) 89 Neb. 749; *Day* v. *Day* (1905) 71 Kan. 385; *Strickland* v. *Strickland* (1906) 80 Ark. 451; *Duberstein* v. *Duberstein* (1898) 171 Ill. 133, 144. In some jurisdictions, however, the doctrine of the Ecclesiastical Courts of England, limiting the recriminatory defence to a like offense, see *Hoffman* v. *Hoffman* (1869) 43 Mo. 547, has been followed. *Staples* v. *Staples* (Tex. Civ. App. 1911) 136 S. W. 120; *Dillon* v. *Dillon* (1880) 32 La. Ann. 643; but see Tiffany, Persons and Dom. Rel. (2nd ed.) § 109. Divorces have been granted where both parties are guilty, *Schirmer* v. *Schirmer* (Wash. 1915) 145 Pac. 981, on grounds of public policy and comparative turpitude, see *Weiss* v. *Weiss* (1913) 174 Mich. 431, or where one offense is the more serious. See *Decker* v. *Decker* (1901) 193 Ill. 285. The doctrine of recrimination has been repudiated in France and Scotland. 2 Bishop, Marriage, Divorce & Separation § 341; see *Brodie* v. *Alexander* 8 Scotch Sess. Cas. (3rd Ser.) 854. In England, petitions for judicial separation which was substituted for the divorce *a mensa et thoro* granted by the Ecclesiastical Courts, 20 & 21 Vict. c. 85 sec. 7, are still subject to the bar of recriminatory defence. *Otway* v. *Otway* (1888) 59 L. T. 153.

But in actions for dissolution of the marriage, it is provided by statute, 20 & 21 Vict. c. 85 sec. 31, that the court may exercise discretion, whereby the older doctrine, which would necessarily deny relief, may be ignored. See *Cleland* v. *Cleland* (1913) 109 L. T. 744; *Brooke* v. *Brooke* (1912) 107 L. T. 202; 2 Bishop, Marriage, Divorce & Separation §§ 357, 358.

EVIDENCE — DECLARATIONS AGAINST INTEREST — ADMISSIBILITY WHERE DECLARANT IS INSANE.—The declaration of a person who had been judicially declared insane before the trial, was offered in evidence as a declaration against his interest. *Held,* two justices dissenting, it was admissible. *Weber* v. *Chicago R. I. & P. Ry* (Iowa 1915) 151 N. W. 825.

That oral or written declarations, which are against the pecuniary or proprietary interest of the declarant are admissible, after his decease, is a well recognized exception to the hearsay rule, 4 Chamberlayne, Evidence, § 2769; *Baker* v. *Taylor* (1893) 54 Minn. 71; *Currier* v. *Gale* (1860) 80 Mass. 504; see *Smith* v. *Hanson* (1908) 34 Utah 171, and rests on the theory that because of the decease of the witness better evidence is not obtainable. See *Fitch* v. *Chapman* (1833) 10 Conn. 8, 12; *Trammell* v. *Hudmon* (1884) 78 Ala. 222. It has been intimated by some authorities that the insanity of a declarant would make his declaration against interest available in the same way as if he were dead, 2 Wigmore, Evidence, § 1456; see *Jones* v. *Henry* (1881) 84 N. C. 320, 324, but no adjudicated case save the principal case has so held; and an early English decision definitely refused to set a precedent by extending the exception to the rule beyond the case of actual death. *Harrison* v. *Blades* (1813) 3 Camp. 457. If it be shown that the declarant is in such a demented condition that he could not properly testify, then the same reasons for admitting his declarations against interest would apply as if he were dead. But if the exception to the hearsay rule be extended to cover cases where the declarant is shown to be insane merely, hearsay evidence will be admitted in some instances where direct evidence could be produced, because insane persons under some circumstances may be competent witnesses. *Regina* v. *Hill* (1851) 5 Cox C. C. 259; *Worthington & Co.* v. *Mencer* (1892) 96 Ala. 310. For this reason an extension of the rule such as laid down in the principal case would seem to be doubtful.

EVIDENCE—FINGER-PRINTS—ADMISSIBILITY TO CONNECT DEFENDANT WITH CRIME.—On a trial for murder an expert testified that finger-prints found on the wall of the house of the deceased were identical with the defendant's finger-prints, and were made by the defendant. *Held,* the testimony was admissible. *People* v. *Roach* (N. Y. 1915) 109 N. E. 618.

Evidence of a type analogous to that offered in the principal case and tending to connect the defendant with the crime has been generally admitted. Thus, evidence that the defendant's hands, *State* v. *Miller* (1905) 71 N. J. L. 527; *Powell* v. *State* (1907) 50 Tex. Cr. 592, or footprints, *Commonwealth* v. *Pope* (1869) 103 Mass. 440; *State* v. *Sexton* (1898) 147 Mo. 89; *Moore* v. *State* (1912) 4 Ala. App. 65, corresponded in shape with marks near the scene of the crime; that his voice sounded like that of the criminal; *Commonwealth* v. *Williams* (1870) 105 Mass. 62; *State* v. *Herbert* (1901) 63 Kan. 516; *Commonwealth* v. *Kelly* (1904) 186 Mass. 403; that he was similar in appearance to the perpetrator of the crime; *State* v. *Lytle* (1895)

117 N. C. 799; *Trulock* v. *State* (1902) 70 Ark. 558; that his clothes appeared the same; *People* v. *Neufeld* (1900) 165 N. Y. 43; or that a photograph of defendant taken at about the time of the crime looked like the criminal, *Shaffer* v. *United States* (D. C. 1904) 24 App. Cas. 417; *cf. Cowley* v. *People* (1881) 83 N. Y. 464, is admissible. The majority of courts admit evidence of trailing by bloodhounds, *Hodge* v. *State* (1893) 98 Ala. 10; see *Pedigo* v. *Commonwealth* (1898) 103 Ky. 41, although the opposite view, based upon the fact that the considerations affecting the bloodhounds' actions cannot be presented to the jury, would seem to be more sound. See 4 Columbia Law Rev., 229; 14 Columbia Law Rev., 535. The question whether the identity of the defendant's finger-prints with those obviously made by the perpetrator of a crime may be shown in evidence has been before the courts in but few cases; but in those its admissibility has been upheld, *Emperor* v. *Abdul Hamid* (1905) 32 Indian L. R. (Calcutta Series) 759; *Parker* v. *The King* (1912) 14 C. L. R. Australia 681; *People* v. *Jennings* (1911) 252 Ill. 534; *State* v. *Cerciello* (1914) 86 N. J. L. 309; *cf.* Chamberlayne, Evidence, § 2072, and the principal case is clearly correct in recognizing that the accuracy now attained in this field renders such evidence admissible.

EQUITY — BLACKLIST — INJUNCTION. — The plaintiff, employed in the shoe factory of one of the defendants, participated in an unlawful strike. His name was thereupon placed upon a blacklist, and as a result of a tacit understanding among defendants, he was discharged from another defendant's factory. The plaintiff seeks to enjoin defendants' alleged conspiracy. *Held*, as plaintiff was guilty of inequitable conduct, the injunction will be denied. *Cornellier* v. *Haverhill Shoe Mfrs. Assn.* (Mass. 1915) 109 N. E. 643.

While an agreement by employers to blacklist an employee is not *per se* actionable, *Jenkinson* v. *Nield* (Q. B. Div. 1892) 8 Times L. R. 540, an employer is liable if by threats and intimidation he coerces others into refusing the workman employment, or is actuated by a malicious desire to injure him. *Mattison* v. *L. S. & M. S. R. R.* (1895) 2 Ohio N. P. 276; (1896) 3 Ohio N. P. 190; *Rhodes* v. *Granby Cotton Mills* (1910) 87 S. C. 18; see 5 Columbia Law Rev., 107, 120; *Joyce* v. *Great Northern Ry.* (1907) 100 Minn. 225; but see *Baker* v. *Metropolitan Life Ins. Co.* (Ky. 1901) 64 S. W. 913. Moreover, the employee has a right of action if his name is wrongfully included in the blacklist. *Blumenthal* v. *Shaw* (C. C. A. 1897) 77 Fed. 954; *Willis* v. *Muscogee Mfg. Co.* (1904) 120 Ga. 597; see *Hundley* v. *Louisville & Nashville R. R.* (1898) 105 Ky. 162. A number of States have passed statutes declaring blacklisting by employers a penal offense, and making the employers liable in damages. Martin, Modern Law of Labor Unions, § 277. Injunctions against blacklisting have seldom been sought and seem never to have been granted. *Boyer* v. *Western Union Tel. Co.* (C. C. 1903) 124 Fed. 246; *Worthington* v. *Waring* (1892) 157 Mass. 421. In neither of these cases, however, did it clearly appear that the blacklisting would have supported an action at law. Injunctions are often granted against boycotts by employees who coerce others not to deal with an employer, *Casey* v. *Cincinnati Typographical Union No. 3* (C. C. 1891) 45 Fed. 135; *Barr* v. *Essex Trades Council* (1894) 53 N. J. Eq. 101; *Wilson* v. *Hey* (1908) 232 Ill. 389, and since the rights of employers and employees, as against each other, should be coextensive, it would seem that injunctions should be granted

against similar combinations of employers to coerce others to discharge or refuse to employ any employee. See *Atkins* v. *Fletcher Co.* (1904) 65 N. J. Eq. 658, 666; Martin, Modern Law of Labor Unions, § 144. The opinion in the principal case seems to intimate the correctness of this view, the injunction being there denied merely because of the plaintiff's inequitable conduct.

ESTOPPEL WITHOUT MISREPRESENTATION.—The defendant corporation laid pipes along the highway for conducting natural gas to consumers after it had obtained permission from the Town Board, who, as a condition precedent to their grant, fixed a maximum rate. After a fruitless effort to obtain permission from the Town Board to raise the rate, the defendant proceeded to do this regardless of its failure, and when sued by a consumer attempted to set up as a defence the fact that it should have applied for permission to lay the pipes, not to the Town Board, but to the Commissioner of Highways. *Held,* by occupying the highways and continuing in possession under color of permission from the Town Board the defendant is estopped to deny the authority of the Town Board to grant this permission. *Farnsworth* v. *Boro Oil & Gas Co.* (N. Y. 1915) 109 N. E. 860. See Notes, p. 702.

HUSBAND AND WIFE—DOWER—REFUSAL TO FOLLOW HUSBAND AS BAR.—In a suit in equity brought by a widow for an injunction to restrain the defendant from disposing of certain real estate alleged to have been the property of the plaintiff's husband at his death, *held,* the fact that plaintiff had not crossed the seas to join her husband and her subsequent falling into immoral practices did not bar her right to dower in her husband's estate. *Orlando* v. *Marmela* (Phila. Co. 1915) 72 Legal Intelligencer 640.

At common law the elopement and adultery of a wife did not operate as a bar to her right of dower. 2 Bl., Comm.,* 130. This, however, was changed by statute declaring that if a woman voluntarily (*sponte*) left her husband and lived with an adulterer, she should be deprived of her dower, unless she and her husband became reconciled. Stat. Westminster II (13 Edw. I) c. 34. In England the courts construe the word "voluntarily" as used in contradistinction to a case where the wife is taken and kept away forcibly by the adulterer, *Woodward* v. *Dowse* (1861) 10 C. B. [N. S.] 722, and have consistently refused the right of dower to a wife who willingly left her husband, although her desertion was caused by her husband's gross misconduct, *Bostock* v. *Smith* (1864) 34 Beav. 57, or where his cruelty was so great as to make further living with him unsafe, and to entitle her to a judicial separation. *Woodward* v. *Dowse, supra.* The statute has been substantially reenacted in many of the American states, or recognized as part of the common law in others. 2 Scribner, Dower (2nd ed.) 535. But the courts in this country have construed the word "voluntarily" differently, and have held that there is not a voluntary elopement, and consequently no bar of dower, where the husband had deserted the wife previously, *Beaty* v. *Richardson* (1899) 56 S. C. 173; see *Gordon* v. *Dickison* (1890) 131 Ill. 141, or where he had abused and abandoned her, *Rawlins* v. *Buttel* (1855) 6 Del. 224, or where after his desertion she refused to follow him. *Heslop* v. *Heslop* (1876) 82 Pa. 537; but see *Stegall* v. *Stegall* (U. S. C. C. 1825) 2 Brock. 256. The decision in the principal case is in accord with the weight of authority in the United States.

JOINT TORT-FEASORS—CONTRIBUTION—NEGLIGENCE OF PLAINTIFF AS BAR TO RECOVERY.—The defendant, in violation of its contract with the plaintiff, allowed its trolley wire to sag at the point where its tracks crossed those of the plaintiff. The plaintiff had knowledge of this condition, yet one of its trains negligently broke the wire, thereby causing an injury to a traveller on an adjacent highway. In an action by the traveller for damages, the plaintiff and the defendant were held jointly liable, but a larger amount was assessed against the plaintiff, who brought this suit for contribution. *Held,* since the plaintiff's negligence was active in causing the injury, contribution will be denied. *Owensboro City Ry.* v. *Louisville & St. L. Ry.* (Ky. 1915) 178 S. W. 1043.

The general rule which allows contribution between parties who are jointly liable is subject to the important exception that between joint tort-feasors who are both morally culpable, there can be no contribution. The law will not allow a plaintiff to base his action on his own misconduct, and thus encourage combinations for wrong doing. *Merryweather* v. *Nixan* (1799) 8 T. R. 186; *Pierson* v. *Thompson* (N. Y. 1831) I Edw. 212, 218; 1 Cooley, Torts (3rd ed.) 261. But where the reason fails, the law fails, and hence contribution is allowed when the plaintiff, though exposed to liability, has knowingly committed no wrong. *Bailey* v. *Bussing* (1859) 28 Conn. 455; *Vandiver* v. *Pollak* (1894) 107 Ala. 547. Where negligence forms the basis of liability, if both parties are guilty of a like neglect of duty, the act or ommission of each being the proximate cause, contribution will not be enforced. *Union Stock Yards Co.* v. *Chicago, etc. R. R.* (1905) 196 U. S. 217; *Old Colony St. R. R.* v. *Brockton R. R.* (1914) 218 Mass. 84; *City of Louisville* v. *Louisville Ry.* (1913) 156 Ky. 141. But if the negligence of the defendant alone is the primary cause of the liability, the negligence of the plaintiff being only passive or technical, the courts have generally allowed contribution or indemnity against the former. *Baltimore & Ohio R. R.* v. *County Commissioners* (1910) 113 Md. 404; *Pennsylvania Steel Co.* v. *Washington etc. Co.* (D. C. 1912) 194 Fed. 1011; *Washington Gas. Co.* v. *Dist. of Columbia* (1896) 161 U. S. 316; but see, *Boott Mills* v. *Boston & Maine R. R.* (1914) 218 Mass. 582. Since the negligence of the plaintiff in the principal case was active and proximate in causing the injury, it would seem that the decision of the court was correct.

JUDGMENT—VACATION—NEGLIGENCE OF ATTORNEY.—In an action in which the present plaintiffs had a valid defence, judgment by default was entered against them because their attorney withdrew from the case without warning when the case was called, the plaintiffs not being present. They brought this proceeding to set the judgment aside. *Held,* that the sudden withdrawal of their attorneys was sufficient cause for vacating the judgment. *McLaughlin* v. *Nettleton* (Okla. 1915) 148 Pac. 987.

In general, an attorney has full control of the conduct of a suit; he may, for example, enter a discontinuance. *Barrett* v. *Third Ave. Ry.* (1871) 45 N. Y. 628. A client cannot, as a matter of right, vacate a judgment obtained against him through his attorney's negligence, *Smith* v. *Tunstead* (1880) 56 Cal. 175; *cf. Church* v. *Lacy & Co.* (1897) 102 Iowa 235, yet the court will occasionally exercise its discretion in such cases, and will set aside a judgment to prevent a flagrant miscarriage of justice, *Sharp* v. *Mayor* (N. Y. 1860) 31 Barb.

578, unless the client has been guilty of neglect. *Allen* v. *McPherson* (1915) 168 N. C. 435. However, the principal case has the support of authority in holding that a party is entitled to have a default opened which was entered because of the unauthorized withdrawal of his attorneys, either out of spite, *Nichells* v. *Nichells* (1895) 5 N. D. 125, or without any apparent malice. *Utah Commercial Bank* v. *Trumbo* (1898) 17 Utah 198. This holding may be explained in two ways. Such action on the attorney's part is more than mere negligence, it is constructively, if not actually, fraudulent. And fraud, of course, is ground for setting the judgment aside. *Connell* v. *Nickey* (Tex. Civ. App. 1914) 167 S. W. 313. Then, too, the client should not be responsible for his attorney's fault, after the latter terminates their relationship by withdrawing; for then the client is in default, not because he refuses through his representative to proceed, but because his former representative refuses to proceed for him. *Kugelman* v. *Katz* (N. Y. 1915) 89 Misc. 461. The principal case is to be commended as in furtherance of the salutary principle of giving every litigant his day in court, whenever possible. *Bovey-Shute Lumber Co.* v. *Lakefield* (1914) 28 N. D. 113.

JUDICIAL SALES—INJURY TO PROPERTY BEFORE CONFIRMATION—LIABILITY OF PURCHASER.—A bankrupt's property was sold at a trustee's sale for $1800. Under the Bankruptcy Act, July 1, 1898, C. 541, § 70b, the sale was made subject to the approval of the court. After the sale and before confirmation by the referee, the property was so damaged by a flood as to be worth only $150. *Held,* this loss was not sustainable by the purchaser. *In re Finks* (C. C. A., 6th Cir. 1915) 224 Fed. 92.

A purchaser at a judicial sale is regarded, before confirmation of the sale by the court, as a mere preferred proposer, the court being at liberty to accept or reject his bid. *Harrel* v. *Blythe* (1906) 140 N. C. 415; *Carr* v. *Carr* (1892) 88 Va. 735; *Apel* v. *Kelsey* (1886) 47 Ark. 413. No title passes until the order of confirmation is made, *In re Shea* (C. C. A. 1903) 126 Fed. 153; *Joyner* v. *Futrell* (1904) 136 N. C. 301, and then, by relation, the purchaser is regarded as the owner from the period of sale. *Wagner* v. *Cohen* (1847) 6 Gill. (Md.) 97; *Cale's Admr.* v. *Shaw* (1889) 33 W. Va. 299. If confirmation is refused, the bidder is relieved of all liability. *Cowper* v. *Weaver's Admr.* (1905) 119 Ky. 401. Whether a sale shall be confirmed is within the discretion of the court, in the exercise of which proper regard is had for the interests of the parties; thus, confirmation has been refused where property was sold for an inadequate price; *Harrel* v. *Blythe, supra;* or where interested parties, though having notified a trustee of their intention to bid, were not notified of the sale. *In re Shea, supra.* And, according to the better view and the weight of authority, if the property is accidentally destroyed after the sale and before confirmation, the purchaser should not be compelled to bear the loss. *Eakin* v. *Herbert* (1867) 44 Tenn. 116; *Harrigan* v. *Golden* (N. Y. 1899) 41 App. Div. 423; *Ex parte Minor* (Eng. 1805) 11 Ves. Jr. 559; *contra Vance's Admr.* v. *Foster* (1872) 72 Ky. 389.

LIBEL AND SLANDER—CONDITIONAL PRIVILEGE—COMPLAINTS ABOUT EMPLOYEES.—The plaintiff was conductor on a railway train. Notices posted in the train requested passengers to report any misconduct on the part of employees. The defendant, a passenger, wrote to the railway company that the plaintiff was drunk while on duty, and in consequence

the plaintiff was discharged. *Held,* since the defendant acted through malice, the plaintiff could recover. *Semble,* defendant's statement was not privileged unless it was true. *Adams* v. *Cameron* (Cal. App. 1915) 150 Pac. 1005; aff'd., *Adams* v. *Cameron* (Cal. 1915) 151 Pac. 286, the Supreme Court expressing disapproval, however, of the dictum of the Appellate Court.

When a person is so situated that it becomes right for him in the interests of society to tell a third person certain facts, then if he *bona fide* and without malice, does tell them, it is a privileged communication. *Davies* v. *Snead* (1870) L. R. 5 Q. B. 608. Accordingly, statements to employers about their servants are privileged, even when voluntary; *Stuart* v. *Bell* [1891] 2 Q. B. 341; *Fresh* v. *Cutter* (1890) 73 Md. 87; so is a complaint about a police officer volunteered to his superior. See *Tyree* v. *Harrison* (1902) 100 Va. 540. In the principal case, therefore, it would seem that the communication was privileged as a communication to an employer about his servant, particularly in view of the printed request for information; furthermore, the public interest in having well behaved railway employees is to be considered. *Cf. Coxhead* v. *Richards* (1846) 15 L. J. C. P. [N. S.] 278. The Appellate Court's dictum that conditionally privileged statements are libelous unless they are true would seem erroneous. Truth in itself is always a defence in civil libel, *McCloskey* v. *Pulitzer Pub. Co.* (1899) 152 Mo. 339, and a conditionally privileged publication, even if untrue, is not actionable unless actual malice is proved. *McDavitt* v. *Boyer* (1897) 169 Ill. 475; see *Hamilton* v. *Eno* (1880) 81 N. Y. 116. The cases on which the dictum was based, *Jarman* v. *Rea* (1902) 137 Cal. 339; *Dauphiny* v. *Buhne* (1908) 153 Cal. 757, and *Tanner* v. *Embree* (1908) 9 Cal. App. 481, though containing expressions that indicate some confusion between privilege and truth as defences, may possibly be distinguished on the ground that they deal with defamation of candidates for public office, and hence really involve the question of fair comment. See 13 Columbia Law Rev., 80.

MALICIOUS PROSECUTION—COMPLAINT—SUFFICIENCY OF GENERAL AVERMENT OF WANT OF PROBABLE CAUSE.—The complaint in an action for malicious prosecution averred that the defendant had maliciously and without probable cause procured an indictment against the plaintiff, which was later quashed. The defendant demurred, on the grounds that such indictment was *prima facie* evidence of probable cause which nullified the plaintiff's allegation that there was no probable cause, and that hence no cause of action was stated. *Held,* the demurrer was correctly sustained. *Wilkinson* v. *McGee* (Mo. 1915) 178 S. W. 471.

In an action for malicious prosecution, a general averment of lack of probable cause is almost universally held to be sufficient. 13 Encyc. Pleading & Practice 439; *Sutor* v. *Wood* (1890) 76 Tex. 403; see *Benson* v. *Bacon* (1884) 99 Ind. 156; *contra, King* v. *Estabrooks* (1905) 77 Vt. 371. Where, however, the complaint also contains allegations of facts which are *prima facie* evidence of the existence of probable cause, for example, that an indictment has been found, the sufficiency of the general averment is disputed. A majority of the courts hold that the presumption is rebutted by the general averment of want of probable cause, so that the complaint is good on demurrer. *Casey* v. *Dorr* (1910) 94 Ark. 433; *Beall* v. *Dadirrian* (N. Y. 1909) 62 Misc. 125, aff. 133 App. Div. 943; *Stainer* v. *San Luis etc. Co.* (C. C. A. 1908) 166 Fed. 220. Since, however, actions for malicious prosecu-

tion are not favored by the law, see *Cloon* v. *Gerry* (1859) 79 Mass. 201; Newell, Malicious Prosecution, § 13, they should be governed by strict rules of pleading. Want of probable cause is an essential element in the plaintiff's case, Burdick, Torts, 249, and it would seem that the presumption arising from the indictment nullifies the general averment, and makes it necessary for the plaintiff to allege further facts to show that the prosecution was, notwithstanding the indictment, without probable cause. *Giusti* v. *Del Papa* (1896) 19 R. I. 338; see dissenting opinion in *Stainer* v. *San Luis etc. Co., supra.*

MORTGAGES—STATUTE OF LIMITATIONS—PAYMENT OF BARRED DEBT AS CONDITION OF RELIEF IN EQUITY.—In an action to remove a cloud upon title by cancelling a deed of trust, it appeared that the note for which the trust deed was given had not been paid, but that the note was barred by the Statute of Limitations. *Held,* equity will not cancel the trust deed until the outlawed debt is paid. *Provident Mutual Building-Loan Assn.* v. *Schwertner* (1914) 15 Ariz. 517; principle affirmed, *Provident Mutual Building-Loan Assn.* v. *Schwertner* (Ariz. 1915) 148 Pac. 911.

It is well settled that equity will not cancel a mortgage, trust deed, or lien, where the debt which it secures is outlawed by the Statute of Limitations, but remains unpaid, on the ground that the Statute affords only a defense, and not a basis of affirmative action. *Cassell* v. *Lowry* (1904) 164 Ind. 1; *Gibson* v. *Johnson* (1906) 73 Kan. 261; *Tracy* v. *Wheeler* (1906) 15 N. D. 248. And, since in most jurisdictions the running of the Statute against the principal obligation does not bar a power of sale contained in the mortgage, *Menzel* v. *Hinton* (1903) 132 N. C. 660; see 6 Columbia Law Rev., 528, the exercise of the power will not be enjoined where the debt remains unpaid. *Goldfrank* v. *Young* (1885) 64 Tex. 432; *House* v. *Carr* (1906) 185 N. Y. 453. The latter cases also support the view that, even assuming the power to be barred, equity will not enjoin the sale for the same reasons for which it refuses to cancel the mortgage. But other courts, proceeding under statutes which in effect bar the exercise of the power when the mortgage debt is barred, or which force all foreclosures into court, have held that the plaintiff, in using the Statute to obtain the injunction, is only using it as a defense to the affirmative action against him which the defendant is threatening to take, and hence is entitled to have the sale enjoined. *Goldwater* v. *Hibernia etc. Society* (1912) 19 Cal. App. 511; *Schwertner* v. *Provident Mutual etc. Assn.* (Ariz. 1915) 148 Pac. 910.

NEGLIGENCE—RES IPSA LOQUITUR—EFFECT OF SPECIFIC ALLEGATIONS.—In a complaint for injuries to the plaintiff's land from the washing out of an embankment left by an excavation of the defendant close to the bed of a river, allegations of specific negligence were made, and on the trial sufficient evidence of the facts constituting such negligence was introduced to make out a *prima facie* case. *Held,* the doctrine of *res ipsa loquitur* could not be invoked. *Lyon* v. *Chicago, M. & St. P. Ry.* (Mont. 1915) 148 Pac. 386.

Although the nature of a case may make it otherwise a proper one in which to invoke the doctrine of *res ipsa loquitur,* it is usually held that when a plaintiff has framed his complaint upon the theory of specific negligence he has so narrowed the issue that the maxim can not be applied. *Norton* v. *Galveston H. & S. Ry.* (Tex. Civ. App.

1908) 108 S. W. 1044; *James* v. *Boston Elevated Ry.* (1909) 201 Mass. 263; *Chicago Union Traction Co.* v. *Leonard* (1906) 126 Ill. App. 189. Certain jurisdictions, while admitting that the recovery must be limited to the specific negligence alleged, assert that the inference permitted by the rule is simply restricted as is the proof, and that until the defendant has negatived the faults ascribed it stands against him. *Terre Haute* v. *Sheeks* (1900) 155 Ind. 74; *Palmer Brick Co.* v. *Chenall* (1904) 119 Ga. 837. But simply because the nature of the occurrence is such that it probably would not have taken place if all due precautions had been observed, the conclusion is hardly warranted that therefore it was caused by the particular negligence that happens to be alleged in the given case. See *Midland Valley R. R.* v. *Conner* (C. C. A. 1914) 217 Fed. 956. If, however, the declaration also contained distinct allegations of general negligence, the inference would tend to support them, and since it is logically pertinent under such allegations as long as the catastrophe remains unexplained, *McNamara* v. *Boston & Maine R. R.* (1909) 202 Mass. 491; *cf. McAnany* v. *Shipley* (Mo. App. 1915) 175 S. W. 1079, the plaintiff should then be granted the benefit of it. *Walters* v. *Seattle R. & S. Ry.* (1908) 48 Wash. 233; *McDonough* v. *Boston Elevated Ry.* (1911) 208 Mass. 436.

PATENTS—RESTRICTION OF RESALE PRICE BY CONTRACT WITH THE ORIGINAL VENDEE.—Patented automobiles of the complainant manufacturer were distributed to dealers under a series of contracts by which the latter received title upon complete payment at a certain discount rate, and agreed to resell the machines at the manufacturer's full list prices only, title to a car to revert upon breach of this stipulation. It was prayed that the defendant be restrained from interfering in any way with performance of the dealers' agreements. *Held,* the promise in question was unenforcible. *Ford Motor Car Co.* v. *Union Motor Sales Co.* (D. C., S. D. Ohio, W. D. 1914) 225 Fed. 373.

The plaintiff sold its patented articles to the defendant on the condition that the latter would resell them only at prices fixed by the plaintiff. In a suit to restrain breach by the defendant of its agreement to that effect it was *held* that an injunction should issue. *American Graphophone Co.* v. *Boston Store of Chicago* (D. C., N. D. Ill., E. D. 1915) 225 Fed. 785.

Since a sale of a patented article unaccompanied by a reservation of any portion of the patentee's peculiar rights therein places that article wholly beyond the control of his monopoly, *Keeler* v. *Standard Folding Bed Co.* (1895) 157 U. S. 659, any agreement made with regard to it at the time of the transfer not amounting to such a reservation stands upon the same footing as any other contract concerning an article not within the scope of the patent laws. Agreements such as those of the principal cases are clearly invalid when made with reference to unpatented articles, *Dr. Miles Medical Co.* v. *Park* (1911) 220 U. S. 373, and so unless the stipulation in question amounts to a reservation of a portion of the monopolistic right of sale it cannot be supported. When a partial reservation of one of the patentee's exclusive rights has been made, a mere notice of the restricted license given is sufficient to confine within the limits of that license the rights of anyone into whose hands the article may come. *Henry* v. *A. B. Dick Co.* (1912) 224 U. S. 1. But a notice that a patented article, for which all direct payment demanded has been made,

may not be resold for less than a certain price is of no effect; *Bauer & Cie* v. *O'Donnell* (1912) 229 U. S. 1; therefore, however much the decision establishing that proposition may be criticised, see 13 Columbia Law Rev., 632; 27 Harvard Law Rev., 73; 63 U. of Pa. Law Rev., 22, under it a restriction on the right of resale can not be considered as such a reservation of a portion of the patentee's exclusive right to vend his product as is permitted. A contract fixing the resale price is, consequently, beyond the protection of the patent laws and must be condemned when in restraint of trade.

PERPETUITIES—LIMITATIONS TOO REMOTE—GIFT OVER OF LIFE INTEREST TO PERSON IN ESSE.—By a marriage settlement, property was put in trust for the husband and wife during their lives, remainder to their children on reaching 25 or marrying, and in default of such children, to the husband's three sisters for life. *Held,* that the remainder for life to the three sisters was void, because it followed the limitation to the children who attain 25 or marry, which was void for remoteness. *In re Hewett's Settlement* (1915) 1 Ch. 810.

In general, any limitation depending or expectant on a prior limitation which is void for remoteness is invalid. *Hancock* v. *Watson* [1902] A. C. 14. Does this rule apply where the subsequent limitation must take effect, if at all, within the period prescribed by law, as where a life estate is limited to a person *in esse*? The court here holds that it does, feeling bound by the decision in *In re Thatcher's Trusts* (1859) 26 Beav. 365, which in turn rests on *Beard* v. *Westcott* (1822) 5 B. & Ald. 801; see *Monypenny* v. *Dering* (1852) 2 De G., M. & G. *145, *181. However, *Beard* v. *Westcott* dealt with limitations void under the old rule against perpetuities, Jarman, Wills (6th ed.) 283, and may be explained on the ground that the estates there limited formed part of a scheme to create an unbarrable entail, and that the whole scheme was void. See Jarman, Wills (6th ed.) 354. Such a limitation as that in the principal case is said to be void, not because it violates the rule against remoteness, but because the testator does not intend it to take effect unless and until the prior limitation is exhausted, and the prior limitation which is void for remoteness can never come into operation, much less be exhausted. See *In re Abbott* [1893] 1 Ch. 54; but see Gray, Perpetuities, § 257. But, if the precise contingency has occurred on which the testator desired the life tenant to take, it can hardly be supposed he would not wish him to take merely because the prior limitation was void from the beginning. See *In re Norton* [1911] 2 Ch. 27, 37. As all life interests to persons now in being must take effect, if at all, within the limits of lives in being, all such interests would seem to be good, though preceded by interests that are too remote. See Gray, Perpetuities (3rd ed.) §§ 252-257; Jarman, Wills (6th ed.) 352; *cf.* Lewis, Perpetuities, *661.

SALES—PAYMENT ON DAY CERTAIN—SELLER'S RIGHT TO PURCHASE PRICE.—The plaintiff contracted to sell defendant 1500 boxes of prunes, payment to be made ten days after shipment on presentation of the bill of lading with draft attached. The parties knew that the prunes could not reach defendant until a later date. *Held,* on defendant's refusal to pay on the day named the plaintiff is entitled under the Uniform Sales Act to bring an action for the contract price and is not limited to a suit for damages. *Lipschitz* v. *Napa Fruit Co.* (C. C. A., 2nd Cir. 1915) 223 Fed. 698.

At common law an unqualified delivery to a carrier specified by the vendee had the same force in passing title as delivery to the vendee himself, *Merchant* v. *Chapman* (1862) 86 Mass. 362; *Wilcox etc. Co.* v. *Green* (1878) 72 N. Y. 17, even though the vendee had a right, upon receipt, to inspect and reject the goods for deficiency in quantity or quality. *Gates* v. *Carquinez Packing Co.* (1889) 78 Cal. 439. But the vendor might retain title by taking a bill of lading in his own name; *Seeligson* v. *Philbrick* (C. C. 1886) 30 Fed. 600; *Indiana Nat. Bank* v. *Colgate* (N. Y. 1871) 4 Daly 41; *First Nat. Bank of Cairo* v. *Crocker* (1872) 111 Mass. 163; and reservation of the *jus disponendi* was frequently effectuated by attaching this bill of lading, endorsed in blank, to a draft for collection, *McArthur Co.* v. *Nat. Bank* (1899) 122 Mich. 223; *cf. Nat. Bank* v. *Merchant's Bank* (1875) 91 U. S. 92, though the inference thus arising from the form of the bill of lading might be rebutted. *Joyce* v. *Swann* (1864) 17 C. B. [N. S.] *84. Unless otherwise specified, delivery and payment were concurrent conditions, *Cole* v. *Swanston* (1850) 1 Cal. *51, but where the vendee agreed to pay on a day certain, he was bound to pay on that date even though he had not acquired title. *Dunlop* v. *Grote* (1845) 2 C. & K. *153; *Amer. Soda Fountain Co.* v. *Vaughn* (1903) 69 N. J. L. 582. This latter rule of the common law has been codified by the Uniform Sales Acts. Under the New York Sales of Goods Act § 144 (2) which is copied from § 49 (2) of the English Act, it seems clear that a refusal to pay under conditions such as those in the principal case gives the vendor a right to sue for the entire contract price. The precise question does not appear previously to have been raised under the Uniform Sales Act. Since the decision in the principal case seems entirely in accord with both the letter and the spirit of the Act, and since it is most desirable that not only the form of the law but also its interpretation shall be uniform, it is to be hoped that other jurisdictions will follow the rule therein laid down.

TORTS—INTERFERENCE WITH EMPLOYMENT—BOYCOTT BY CHAMBER OF COMMERCE.—Where, pursuant to its by-laws, upon pain of expulsion, a Chamber of Commerce prohibited its members from having any further dealings with the plaintiff, who was indebted to one of its members, *held,* there being no legal coercion, the plaintiff had no right of action when the members terminated his employment. *McCarter* v. *Baltimore Chamber of Commerce* (Md. 1915) 94 Atl. 541.

An act which is lawful on the part of an individual cannot become unlawful merely because a number of persons join in it, *Mogul Steamship Co.* v. *McGregor* (1889) 23 Q. B. D. 598; see 13 Columbia Law Rev., 66, and where the purpose of the act is lawful, for example, to further the interests of the members, or to protect them from insolvent creditors, no action will lie, even though a third party is thereby injured. *Delz* v. *Winfree* (1894) 6 Tex. Civ. App. 11; *Brewster* v. *Miller's Sons* (1897) 101 Ky. 368; *Macauley* v. *Tierney* (1895) 19 R. I. 255; see *Reynolds* v. *Plumbers' Material Protective Assn.* (N. Y. 1900) 30 Misc. 709. But where such act is the means of accomplishing an unlawful end, it becomes actionable. *Klingel's Pharmacy* v. *Sharp & Dohme* (1906) 104 Md. 218; *Hawarden* v. *Youghiogheny & Lehigh Coal Co.* (1901) 111 Wis. 545. Furthermore, although the purpose may be lawful, it may not be accomplished by unlawful means; and where the members are coerced into concerted action and injury results, the injured party may recover. *Martell* v. *White* (1904) 185 Mass. 255. It is generally held that where fines are imposed, coercion is

employed. *Boutwell* v. *Marr* (1899) 71 Vt. 1; *Martell* v. *White, supra;* but *cf. Brewster* v. *Miller's Sons, supra.* But where by-laws provide for expulsion for non-compliance with the regulations, although it would seem that such a by-law might have just as much coercive force as one imposing a fine, *Jackson* v. *Stanfield* (1894) 137 Ind. 592, the weight of authority is with the principal case that there is no unlawful coercion. *Bohn Mfg. Co.* v. *Hollis* (1893) 54 Minn. 223; *Macauley* v. *Tierney, supra.*

TRANSFER TAX—SUCCESSION TO PROPERTY BY RIGHT OF DOWER AND AS TENANT BY THE ENTIRETY.—The State attempted to collect an inheritance tax on the succession by a widow to property by right of dower. *Held,* since dower is not received by the widow as heir, but in her own right, it is not subject to the inheritance tax. *In re Bullen's Estate* (Utah 1915) 151 Pac. 533.

A husband attempted to create a tenancy by entirety by conveying an estate to himself and his wife. On the death of the husband the widow claimed exemption from transfer tax on the ground that she took as survivor in her own right, and not by intestate laws. *Held,* the conveyance was ineffectual to create an estate by the entirety, but resulted in making the husband and wife tenants in common, and the widow is liable to pay tax on half of the estate. *Matter of Estate of John C. Klatzl* (N. Y. 1915) 54 N. Y. L. J. 235. See Notes, p. 692.

WATERS AND WATERCOURSES—MILL PRIVILEGES—RIGHT TO TAKE ICE.—*Held,* the right of flowage belonging to the owner of a dam does not carry with it the right to take ice from the water which the dam causes to collect over the land of the plaintiff, the owner of the servient estate. *Valentino* v. *Schantz* (1915) 216 N. Y. 1.

The grant of a right to flow lands creates merely an easement and will not carry title to the soil. *Herbertson* v. *Cunningham* (1873) 14 N. Brunsw. 235. The owner of the servient estate may make any use of the land he pleases which does not interfere with the rights of the owner of the easement, such as placing booms and wharves in the water, *Jordan* v. *Woodward* (1855) 40 Me. 317, removing "No Fishing" signs placed in the water by the owner of the dominant estate, *Sultings* v. *Carter* (1895) 105 Mich. 392, or, as in the principal case, removing ice from that portion of the pond covering his own land. *Dodge* v. *Berry* (N. Y. 1882) 26 Hun 246; *Hazelton* v. *Webster* (N. Y. 1897) 20 App. Div. 177; *Beechwood Ice Co.* v. *American Ice Co.* (C. C. 1910) 176 Fed. 435; *Paine* v. *Woods* (1871) 108 Mass. 160. It is often said, however, that the mill-owner has the right to have the ice remain if its removal would appreciably diminish the head of water at the dam; see *Dodge* v. *Berry, supra; Bigelow* v. *Shaw* (1887) 65 Mich. 341; *Stevens* v. *Kelley* (1886) 78 Me. 445; and he may draw the water off if necessary to the successful operation of the mill, *Stevens* v. *Kelley, supra;* see *Eidemiller Ice Co.* v. *Guthrie* (1894) 42 Neb. 238, although he would be liable to the riparian owner if this were done needlessly and wantonly so as to injure the ice. *Stevens* v. *Kelley, supra*; *Eidemiller Ice Co.* v. *Guthrie, supra.* The early case of *Myer* v. *Whitaker* (N. Y. 1878) 55 How. Pr. 376 is necessarily overruled by the principal case; and the other apparently adverse holding of *Mill River Co.* v. *Smith* (1867) 34 Conn. 462 has been explained away by a later decision of the same court. *Howe* v. *Andrews* (1892) 62 Conn. 398. The principal case is in accord with sound reasoning and the authorities today.

WILLS—PARTIAL REVOCATION BY ACT.—The testatrix cut out two paragraphs of her will with intention of revoking the clauses contained therein. *Held,* the clauses are not revoked and the will should be probated with the missing parts included if established by evidence. If not established, the remaining part should be probated. *Matter of Kent* (N. Y. App. Div. 4th Dept., 1915) Rochester Daily Record, Oct. 19, 1915.

Under statutes which, like the Statute of Frauds, 29 Car. II, c. 3, § 6 and the Wills Act, 1 Vict., c. 26, § 20 provide that a will or part thereof can be revoked, it is the universal doctrine that a will can be partially revoked by the acts prescribed in the Statute. *Swinton* v. *Bailey* (1878) 4 App. Cas. 70; *Goods of Leach* (1890) 63 L. T. Rep. N. S. 111; *Re Wood's Estate* (Pa. 1915) 93 Atl. 483; Schouler, Wills (5th ed.) § 397. When a new testamentary disposition is thereby effected, revocation of a part of a will is not allowed. *Eschbach* v. *Collins* (1883) 61 Md. 478. Under Statutes which merely say that the "will" may be revoked by a codicil or will in writing or the acts prescribed, the weight of authority favors the view that a partial revocation by an act is not possible. *Law* v. *Law* (1887) 83 Ala. 432; *Hartz* v. *Sobel* (1911) 136 Ga. 565; *Giffin* v. *Brooks* (1891) 48 Ohio St. 211; Gardner, Wills, 259. The contrary view obtains in Massachusetts, where the Rev. Laws, c. 135, § 8, provides that no "will" shall be revoked, except by burning, tearing, cancellation or obliteration, or by some other writing signed, attested, and subscribed in the manner provided for making a will, *Bigelow* v. *Gillott* (1877) 123 Mass. 102, the court basing its construction of the Statute on the ground that disallowance of a partial revocation by act would exclude the possibility of a partial revocation by another will or codicil. This rule has been followed in Iowa where § 3276 of the Code provides that "wills" can only be revoked by being cancelled or destroyed or by subsequent wills, and that a revocation by cancellation must be witnessed in the same manner as the making of a new will. *Richardson* v. *Baird* (1905) 126 Iowa 408; In New York, the Decedent Estate Law, § 34, provides that "no will or part thereof" shall be revoked except by another will or codicil. The next clause provides that "a will" may be revoked by burning, tearing, cancelling or destroying. It has been held that the words relating to revocation of a part of the will having been omitted in the second clause there could not be a revocation *pro tanto* by an act. *Lovell* v. *Quitman* (1882) 88 N. Y. 377. Since part revocation of a will by an act is not allowed in New York, it would seem inconsistent to allow probate of the remainder of the will if there is not sufficient evidence to show the missing parts.

WRONGFUL DEATH—DAMAGES—INHERITANCE OF DECEASED'S ESTATE IN REDUCTION.—In an action by children for the negligent death of a parent whose income had been derived in part from fixed property, independent of her own exertions, *held,* evidence of the property received by plaintiffs in the distribution of the parent's estate was not admissible in reduction of damages. *McLaughlin* v. *United Railways* (Cal. 1915) 147 Pac. 149.

In the United States, damages for the death of a parent or relative may not be reduced by proof of the plaintiff's receipt of insurance on the life of the deceased. *Western & Atlantic Ry.* v. *Meigs* (1885) 74 Ga. 857; *Clune* v. *Ristine* (C. C. A. 1899) 94 Fed. 745; *Illinois Central Ry.* v. *Prickett* (1904) 210 Ill. 140. The English courts,

while they refuse to permit the amount of life insurance received by the plaintiff to be deducted from his damages for the death, *Grand Trunk Ry.* v. *Jennings* (1888) 13 App. Cas. 800, have held that the amount of accident insurance left by the deceased may be deducted from the damages, and the accelerated receipt of other insurances considered in reduction. *Hicks* v. *Newport etc. Ry.* (Nisi Prius 1857) 4 B. & S. *403n; see *Bradburn* v. *Great Western Ry.* (1874) L. R. 10 Exch. 1. The American courts hold, furthermore, that the damages may not be reduced by proof that the plaintiff came into possession of his relative's property as a result of the death. *Terry* v. *Jewett* (N. Y. 1879) 17 Hun 395; *Houston* v. *Gran* (1894) 38 Neb. 687; *Stahler* v. *P. & R. Ry.* (1901) 199 Pa. 383; compare *Pym* v. *Great Northern Ry.* (1863) 4 B. & S. *396. But the purpose of the statutes (based on Lord Campbell's Act) which permit the plaintiff's recovery is to compensate the plaintiff for his loss of aid from the deceased, and where, as in the principal case, part of the income of the person killed was derived from fixed property, wholly independent of her exertions, and this was inherited by the plaintiffs, it would seem that the damages should be limited to an amount based upon the income of the deceased from her own labors, which aid was lost to the plaintiffs by reason of the death. *San Antonio & A. P. Ry.* v. *Long* (1894) 87 Tex. 148, as limited by *Gulf, C. & S. Ry.* v. *Younger* (1897) 90 Tex. 387.